Supreme Court, U.S.
FILED
SEP 13 2002
OFFICE OF THE CLERK

No. 02-172

IN THE

Supreme Court of the United States

BETH B. and SUSAN AND TOM B.,
Individually and as Next Friends of BETH B.,

Petitioners,

v.

MARK VAN CLAY, Individually and in his Official Capacity as Superintendent, and LAKE BLUFF SCHOOL DISTRICT #65,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

JULI WILSON MARSHALL*
KATHLEEN RAVEN GURROLA
JASON D. ROSENBERG
JULIANNE M. HARTZELL
LATHAM & WATKINS
233 South Wacker Drive
Sears Tower, Suite 5800
Chicago, Illinois 60606
(312) 876-7700

* *Counsel of Record*

Attorneys for Petitioners

176247

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

15 pp

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Reply Brief in Opposition 1

I. The Seventh Circuit Decision Conflicts With The Third And Ninth Circuits' Decisions By Misapplying The Presumption In Favor Of Mainstreaming. 1

II. The LRE Test Adopted By The Seventh Circuit Conflicts With The Tests Adopted By Other Circuits And Application Of The Various Tests To One Set Of Facts Will Result In Different Treatment Of Children With Disabilities Depending On The Circuit In Which They Reside. 4

A. The lower courts are in conflict on the baseline for the LRE analysis under each of the LRE tests. 4

B. The various LRE tests do not take the same factors into consideration, resulting in different outcomes for one set of facts in Circuits with different tests. 6

III. This Case Has Far-Reaching Special Education Implications. 10

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

Cases:

A.W. v. Northwest R-1 Sch. Dist., 813 F.2d 158 (8th Cir. 1987) 5

Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036 (5th Cir. 1989) 4, 5, 7, 8, 9

Devries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989) 5

Kerkam v. Superintendent, D.C. Pub. Schs., 931 F.2d 84 (D.C. Cir. 1991) 8

Oberti v. Bd. of Educ., 995 F.2d 1204 (3d Cir. 1993) 6, 7, 8, 9, 10

Ojai Unified School Dist. v Jackson, 4 F.3d 1467 (9th Cir. 1993) 3

Polk v. Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988) 3

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) 4, 5, 6, 7, 8

Sacramento City Unified Sch. Dist. v. Rachel H. by Holland, 14 F.3d 1398 (9th Cir. 1994) 4, 5, 9

Cited Authorities

Page

Statute:

20 U.S.C.A. § 1412(a)(5)(A) 2

Other Authority:

34 C.F.R. § 300.551 2

REPLY BRIEF IN OPPOSITION

Respondents work hard to create the illusion that the "least restrictive environment" ("LRE") tests adopted by the various Circuit Courts are "nearly identical," but their brief merely illustrates the confusion and incoherence that plague the lower courts. Respondents argue that tests that "simply do the opposite" or are "hybrids" of one another are "nearly identical" in a transparent attempt to gloss over the inter-Circuit conflicts. Respondents' Brief in Opposition ("Opp.") at 10. Contrary to Respondents' argument, application of the four different LRE tests applied by the Circuits to the same set of facts will often result in different outcomes. The Seventh Circuit's decision, and the split among the Circuits, will have far-reaching implications for children with disabilities in the Seventh Circuit and throughout the United States. Further, Respondents recognize that this Court has not addressed the correct standard for applying the LRE test, virtually conceding the certworthiness of this case.

I. The Seventh Circuit Decision Conflicts With The Third And Ninth Circuits' Decisions By Misapplying The Presumption In Favor Of Mainstreaming.

The Individuals with Disabilities Education Act ("IDEA") requires that the school district bear the burden of proving, by a preponderance of the evidence, that a more restrictive placement meets the IDEA's mainstreaming requirements[1] to educate the child in the "least restrictive environment" "to the maximum

---

1. Respondents have yet to identify the school district or "building" to which they would assign Beth notwithstanding their rhetoric that it will be a "neighboring school district." Opp. at 1. Indeed, the "neighboring school districts" identified as possible placements by Respondents are as much as an hour away, an exhausting bus ride for a girl with Rett Syndrome. The bus ride alone would steal valuable amounts of Beth's most productive learning time and experts testified that it would actually harm her education. The potential harm to Beth was ignored by the Seventh Circuit. Further Respondents have not yet committed to any mainstreaming despite their reference to "opportunities for mainstreaming." Pet., App. A at 4a n.1.

extent appropriate." IDEA, 20 U.S.C.A. § 1412(a)(5)(A); 34 C.F.R. § 300.551. Respondents have failed to carry this burden. The hearing officer, and subsequently the district court and Seventh Circuit, relieved the School District of its burden and applied an incorrect legal standard that erroneously deferred to the School District's presumed expertise when the evidence was insufficient to satisfy the School District's burden.[2] *See* Pet. at 9, 13-15.

Perhaps lacking anything persuasive to say on the subject, Respondents argue that the hearing officer's failure to consider factors cited by other Circuits as part of the LRE analysis was irrelevant. Opp. at 3. Respondents also argue that the hearing officer applied the "correct standard" to the LRE question, citing a passage in his opinion which underscores our point, not Respondents. Opp. at 3. The quoted passage contains no standard but only the empty conclusion that Respondents satisfied the IDEA because the process they went through to make their placement decision was adequate.

Contrary to Respondents' assertion, there is nothing at all misleading in Petitioners' arguments concerning the hearing officer's failure to make factual findings that the School District

---

2. Significantly, in deferring to the School District's experts, the Seventh Circuit disregarded the hearing officer's finding that he was unable to credit the testimony of one party's experts over the other. Pet., App. C at 78a-79a. Petitioners' equally qualified experts testified that Beth's curriculum was far more advanced than preschool. Even the hearing officer noted that Beth's providers stated that she was writing stories and poems by the second grade with assistative devices. *See, e.g.*, Pet., App. C at 62a. The Seventh Circuit also adopted Respondents' characterization of Beth as being "in class" for only about fifty percent of each day and Respondents' latch on to this as proof that Beth was more than "sometimes absent." However, as Respondents well know, a portion of her time spent outside of her physical classroom was spent with private educators or in physical, occupational or speech therapy sessions which were a part of her IEP, and as such, were part of her educational program.

carried its burden of proof. As discussed in the Petition at length, the hearing officer repeatedly stated that he was unable to find decisive evidence to credit the testimony of one side over the other. *See id.* On the basis of this finding alone, the correct conclusion of law was that Respondents failed to carry their burden of proof justifying removal of Beth from her regular school placement. Instead, the hearing officer invented a new legal standard against which to measure the school district's placement decision, finding that the school district was only required to make an "adequate" effort in determining Beth's placement. This error transforms the IDEA's substantive presumption in favor of mainstreaming into a mere procedural safeguard that looks to the adequacy of the School District's decision-making process and its lack of bad faith as grounds for approving the placement decision.[3] Each of the lower courts applied the improper standard of deference to the School District in a decision that all but eviscerates the substantive rights Congress provided for children with disabilities under the IDEA.

As explained in the Petition, the Seventh Circuit's undue deference to school district is in direct conflict with decisions in both the Third and the Ninth Circuits. Pet. at 16-17. The Third Circuit recognized that such deference would be an abdication of its obligation to enforce the statutory provisions of the IDEA. *Polk v. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184 (3d Cir. 1988). The Ninth Circuit held that treating the views of school personnel as conclusive would make administrative review unnecessary. *See Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993).

---

3. These are the "procedural" standards identified in the hearing officer's opinion and approved by the lower courts in this case. *See* Pet., App. C at 78a-80a, 91a; Pet., App. B at 23a-24a.

II. The LRE Test Adopted By The Seventh Circuit Conflicts With The Tests Adopted By Other Circuits And Application Of The Various Tests To One Set Of Facts Will Result In Different Treatment Of Children With Disabilities Depending On The Circuit In Which They Reside.

Not only do the various LRE tests applied throughout the country conflict on the question of which placement the court should consider as the beginning point of the LRE analysis, they also require the consideration of different factors to determine if a placement is appropriate. These differences, contrary to Respondents' arguments, are not merely semantic; they lead to different results depending upon the Circuit. Respondents ignore these differences and characterize the tests as "nearly identical" despite the fact that they concede that one "simply does the opposite" of the other or that some are hybrids of others. Opp. at 10.

A. The lower courts are in conflict on the baseline for the LRE analysis under each of the LRE tests.

The Sixth Circuit's decision in *Roncker* begins its analysis by looking at the more restrictive placement, while the Ninth Circuit in *Holland* and the Fifth Circuit in *Daniel R.R.* start with the less restrictive placement. Opp. at 10; *Sacramento City Unified Sch. Dist. v. Rachel H. by Holland*, 14 F.3d 1398, 1400-01 (9th Cir. 1994); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048-50 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The Seventh Circuit picked yet a third starting place — the school district's recommended placement. Pet., App. A at 8a.

Under *Roncker*, the primary focus of the LRE analysis is on the services available in the more restrictive placement. *Roncker*, 700 F.2d at 1063. If services which are superior in the restrictive placement cannot be implemented feasibly in a regular classroom, then the more restrictive placement is appropriate. *See id.* Presumably any child, whether disabled or not, would benefit academically from the smaller class size that typically characterizes the segregated special education classroom.

Similarly, by their nature, special education classrooms are meant to provide certain services that are not easily or conveniently duplicated in the regular classroom. These factors tip the scales toward the restrictive placement in every case. This silent presumption in favor of the more restrictive placement will necessarily affect the outcome of cases considered in the Sixth Circuit, and the Fourth and Eighth Circuits, which follow *Roncker*. *See Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir. 1987). If the school district wishes to segregate a child in a restrictive classroom setting, it can point to a plethora of services offered in special education not conveniently or economically offered in the regular classroom, and from there, argue that such services are not "feasibly" provided in the regular classroom.

Under the Fifth Circuit's *Daniel R.R.* decision, the focus is on whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily for a given child. *Daniel R.R.*, 874 F.2d at 1048-50. If it cannot, the court must ask whether the school has mainstreamed the child to the maximum extent appropriate in the more restrictive setting. Similarly, under the Ninth Circuit's test in *Holland*, the focus is on the benefits and services available in the regular education classroom.[4] *Holland*, 14 F.2d at 1400-01. By beginning the analysis with the least restrictive placement and maintaining a presumption of regular education unless proven inappropriate, *Daniel R.R.* and *Holland* at least start at the proper baseline because they maintain the IDEA's presumption favoring mainstreaming. However, as discussed below, they apply various factors that are not found in the IDEA and deny children their substantive rights as a result.

---

4. *Holland* balances the factors of: (1) educational benefits available to the student in a regular classroom; (2) non-academic benefits of interactions with non-disabled children; (3) the effect of the student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the student. *Holland*, 14 F.3d at 1400-01.

The Seventh Circuit's LRE analysis starts from yet another — and exceedingly dangerous — baseline, the school district's proposed placement. *See* Pet., App. A at 8a-10a. Under the Seventh Circuit's test, courts first determine whether a school district's proposed placement meets the "free and appropriate education" standard by providing some educational benefit, even if it is the more restrictive placement. *See id.* If so, the burden effectively shifts to the parents and child to show that another, less restrictive placement, is more appropriate so long as the school district acted adequately in its decision-making process and didn't overtly demonstrate bad faith. *See id.* If, instead, the Seventh Circuit began its baseline inquiry with the least restrictive placement, as urged by Petitioner — not the school district's proposed placement — and asked whether a "free and appropriate education" was provided in the less restrictive placement, then it would have properly applied the presumption in favor of mainstreaming. Instead, the Seventh Circuit turned the presumption to favor school districts — bringing it in direct conflict with other circuits, including the Third Circuit in *Oberti*. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (holding that the presumption in favor of mainstreaming "would be turned on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom."). This is particularly so since the school district, the party with better access to relevant information, will have no motivation to submit evidence in support of a placement it does not recommend. *See id.*

B. The various LRE tests do not take the same factors into consideration, resulting in different outcomes for one set of facts in Circuits with different tests.

There are many different LRE factors considered by the various Circuits, resulting in inter-Circuit conflicts. For example, the Circuits do not agree upon whether, or how much, to consider "non-academic" benefits of placement in a regular education classroom. As discussed *supra*, the *Roncker* test focuses

primarily on the academic advantage available to the student in a segregated placement without any significant regard to the other benefits to the student of placement in the regular classroom. *Roncker*, 700 F.2d at 1063. Thus, under *Roncker*, if the proposed placement is found to be academically superior and cannot be implemented feasibly in a regular classroom, then the child would likely be placed in a segregated classroom and the court would not consider the benefits of the less restrictive placement.

Similarly, while the Seventh Circuit has not articulated specific factors to be considered in its LRE analysis, in this case, evidence of non-academic benefits was presented to the court, but disregarded by it. Pet., App. A at 11a. For example, the Seventh Circuit acknowledged that Beth made limited developmental achievement, but held that, in light of Beth's lack of academic progress in comparison to her peers, this did not constitute a satisfactory education. Pet., App. A at 11a. Further, while Beth made progress in relation to her own IEP,[5] the Seventh Circuit measured her academic progress against peers as "virtually nonexistent." Thus, the Seventh Circuit disregards evidence of progress unless it is measurable academic progress made in relation to peers and in so doing, condemns children with moderate to severe disabilities to segregated restrictive placements regardless of what benefits they may achieve from regular school placement.

On the other hand, the outcome would likely be different for a child in the D.C. Circuit, the Fifth Circuit, or Third Circuit. Both *Oberti* and *Daniel R.R.* hold that simply because a child

---

5. While the physical symptoms of Rett Syndrome detailed in our Petition make it difficult to determine Beth's cognitive abilities and progress accurately and consistently, Beth's private therapist testified that between November 1999 and June 2000, Beth had progressed in thirteen of the sixteen objectives set by the School District, and made no progress in only two areas. Even the School District's own experts concede that "there are clearly some areas in which Beth has displayed some progress." *See Beth B. v. Van Clay*, No. 00 C 4771, Pl.'s Ex. 5; AR 2327-35; AR 10401-13; AR 11193; AR 13226-32.

with disabilities might make greater *academic* progress in a segregated, special education class does not warrant excluding the child from a regular classroom environment. *Oberti*, 995 F.2d at 1217; *Daniel R.R.*, 874 F.2d at 1049. Both courts specifically acknowledge that "[i]ntegrating a handicapped child into a nonhandicapped environment may be beneficial in and of itself." *Oberti*, 995 F.2d at 1217; *Daniel R.R.*, 874 F.2d at 1049. In the same vein, the D.C. Circuit has defined the LRE requirement as "one that confers *some educational benefit* but most closely approximates education with nonhandicapped children in the school that the handicapped child would attend if he had no handicap." *Kerkam v. Superintendent, D.C. Pub. Schs.*, 931 F.2d 84, 87 (D.C. Cir. 1991) (*emphasis added*); Pet. at 18-20.

A second difference between the tests is identified by the Third Circuit in *Oberti*, when it rejected the *Roncker* test in favor of the *Daniel R.R.* test. *Oberti*, 995 F.2d at 1215. The *Oberti* court notes that *Roncker* compares placement in a segregated class with placement in a regular class without considering interim solutions whereas the *Daniel R.R.* test recognizes that the IDEA requires consideration of interim solutions to ensure that a child is mainstreamed whenever possible. *See id.* (finding that, as opposed to the *Daniel R.R.* test, "the *Roncker* test fails to make clear that even if placement in the regular classroom cannot be achieved satisfactorily for the major portion of a particular child's education program, the school is still required to include that child in school programs with non-disabled children . . . whenever possible."). Under *Roncker*, the child for whom mainstreaming is appropriate for a majority of the day, but who would benefit from a few hours in a segregated setting would be placed in a segregated classroom full-time. Whereas the same child under *Daniel R.R.* or *Oberti* would be permitted to remain in regular education for part of his or her day and attend a segregated class for a portion of their day. *See id.*

A third difference between the LRE tests is that only *Oberti* requires consideration of the benefits to non-disabled students of including students with disabilities in the class. *Oberti*, 995 F.2d at 1217 n.24. ("Courts should also consider the reciprocal benefits of inclusion to the non-disabled students in the class"). This factor is an essential difference as it supports the presumption in favor of mainstreaming and will, in cases where the benefits of a segregated placement over placement in a regular classroom are evenly distributed, tip the balance in favor of mainstreaming, a presumption intended by Congress. Congress intended the IDEA to benefit non-disabled students as well as disabled students. *See* Pet. at 2-3. The Seventh Circuit did not consider this factor. Pet., App. A at *passim*.

A fourth difference between the tests is that *Daniel R.R.* treats the degree of modification to the regular curriculum as a potentially dispositive factor in placement decisions, whereas the *Holland* test does not. *Daniel R.R.*, 874 F.2d at 1049; *Holland*, 14 F.3d at 1400-01. The effect of this difference on the outcome of similarly situated students is demonstrated by Respondents' hypothetical student who has a "sixth grade curriculum that is modified to a preschool level." Under *Daniel R.R.*, the degree of modification could be dispositive: "mainstreaming would be pointless if we forced instructors to modify the regular education curriculum to the extent that the handicapped child is not required to learn any of the skills normally taught in regular education." *Daniel R.R.*, 874 F.2d at 1049. This overly narrow construction ignores situations such as Beth's where, we urge, language and comprehension are learned by exposure to peers without disabilities and that this is an educational benefit. Moreover, under the *Holland* test, if the cost of implementing the curriculum change is not substantial, the child receives academic and non-academic benefit from remaining in the regular classroom and the child is not disruptive to the other students, that child would likely remain in the regular classroom. *Holland*, 14 F.3d at 1400-01. Similarly, under the *Oberti* test, the court acknowledges that "the school must also

make efforts to modify the regular education program to accommodate a disabled child," without putting any limitation on the amount of modification required. *Oberti*, 995 F.2d at 1216.

III. This Case Has Far-Reaching Special Education Implications.

Respondents claim that because "[t]he fact pattern of this case is impossible of being replicated," it does not have far-reaching implications. Opp. at 11. Respondents do not explain what they mean. Certainly parents and school districts frequently address the issue of children's rights for mainstreaming under the IDEA. Every child with disabilities in the Seventh Circuit is affected by the decision below.

The Seventh Circuit effectively shifts the burden of proof on the LRE issue from the school district to parents who will be forced to put forth evidence to prove that their child can be "appropriately" educated in a regular education classroom. This eviscerates the rights of students with disabilities and their parents under the IDEA so that, in the end, students and parents in the Seventh Circuit and other circuits will have fewer rights under the IDEA and less access to education in a regular education setting than students and parents elsewhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JULI WILSON MARSHALL*
KATHLEEN RAVEN GURROLA
JASON D. ROSENBERG
JULIANNE M. HARTZELL
LATHAM & WATKINS
233 South Wacker Drive
Sears Tower, Suite 5800
Chicago, Illinois 60606
(312) 876-7700

Attorneys for Petitioners

* *Counsel of Record*